

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

77-4204

B
P/S

United States Court of Appeals
For the Second Circuit

CHI YIM WU



Petitioner,

-against-

IMMIGRATION AND NATURALIZATION SERVICE

Respondent

PETITIONER'S APPENDIX

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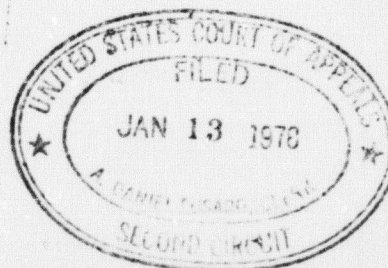
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TRANSCRIPT OF TESTIMONY (Pages A1-A13)

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

MATTER OF

FILE A- 16 011 582 - NEW YORK

WAO TEN CHEN
a/a/a
GELI YEN WU

IN DEPORTATION PROCEEDINGS

TRANSCRIPT OF HEARING

Before: ALEXANDER SCHENFELD, Immigration Judge

Date: AUGUST 4, 1976 Place: 20 West Broadway

Transcribed by Martha Pastor Recorded by Gray

Official Interpreter Mr. Fung

Language CHINESE

APPEARANCES:

For the Service:

PATRICIA ROSEN
Trial Attorney
NEW YORK, N.Y. 10007
Station

For the Respondent:

FRIED, FRAGOSEN & DEL REY, P.C.
515 MADISON AVENUE
NEW YORK, N.Y. 10022
Patrick Quame, Esq., of counsel

1 IMMIGRATION JUDGE TO RESPONDENT (THROUGH OFFICIAL INTERPRETER):

2 Q. Sir, would you stand and raise your right hand.

3 Do you solemnly swear that the statements you make here today will
4 be the truth, the whole truth, and nothing but the truth, so help
5 you God?

6 A. Yes.

7 Q. What is your name, sir?

8 A. ...

9 MR. QUANE:

10 Your honor, before we start may I submit a motion on this case?

11 IMMIGRATION JUDGE:

12 What kind of a motion, sir?

13 MR. QUANE:

14 A separate hearing.

15 IMMIGRATION JUDGE:

16 A separate hearing?

17 MR. QUANE:

18 A separate suppression hearing.

19 IMMIGRATION JUDGE:

20 Well, lets start the case first and then you can make your motion
21 during the hearing. We haven't started the case. We don't even
22 know who is here.

23 IMMIGRATION JUDGE TO RESPONDENT:

24 Q. What is your name?

25 A. Chi Yen Yu

26 Q. Are you also known as Wao Tse Chen?

1 A. Because you see the English pronunciation and spelling is a little
2 bit different, so its final would be, ...

3 Q. *are you also known as*
4 Wao Tse Chen.

5 A. It cannot be two names.

6 Q. All right, and you understand and speak Chinese?

7 A. Shanghai

8 Q. And do you understand Mr. Fung who is the interpreter here today,
9 who is speaking to you?

10 A. Yes, I understand.

11 Q. I see, and Mr. Quane from the firm of Fried Fragomen & Del Rey, P.C.
12 Esquires, is he your attorney in this case?

13 A. Yes, he is my lawyer.

14 IMMIGRATION JUDGE TO COUNSEL:

15 Q. Now, Mr. Quane, on behalf of Mr. Wao Tse Chen do you acknowledge
16 receipt of the Order To Show Cause in this case?

17 A. I do, your honor.

18 Q. All right, I'll mark it Exhibit 1. On his behalf do you waive
19 the reading of the allegations and admit the truth of the allega-
20 tions in the Order to Show Cause?

21 A. No, your honor I waive the reading of the allegations but I do not
22 wish to admit to the allegations.

23 IMMIGRATION JUDGE:

24 All right, you may proceed, Mrs. Rohan.

25 MRS. ROHAN TO RESPONDENT:

26 Q. Mr. Chen, where were you born?

MC. QUANE: (simultaneous with I.J.)
I object ...

TRANSCRIPT OF HEARING

United States Department of Justice — Immigration and Naturalization Service

1 IMMIGRATION JUDGE:

2 I'll ask the respondent questions on the Order to Show Cause.

3 IMMIGRATION JUDGE TO RESPONDENT:

4 Q. Is it true, Mr. Wao Tse Chen that you are not a citizen or national
5 of the United States?

6 A. What?

7 Q. Is it true that you are not a citizen of the United States or na-
8 tional?

9 MR. QUANE:

10 I object to the question. I would like ...

11 IMMIGRATION JUDGE:

12 You object to my question?

13 MR. QUANE:

14 Yes, your honor, it is respectfully objected.

15 IMMIGRATION JUDGE:

16 Are you objecting to the Order to Show Cause form?

17 MR. QUANE:

18 No, before you get into that, your honor, I would like to submit
19 a motion ...

20 IMMIGRATION JUDGE:

21 Well, I ^{want} his answer. First I ~~would like~~ to go ahead with the de-
22 portation hearing and then if you feel that you do not want to con-
23 cede deportability it's one thing, but I want to establish some of
24 the elements of the Order to Show Cause before we proceed. Maybe
25 there is no need for your motion.

26 MR. QUANE: ...

TRANSCRIPT OF HEARING

United States Department of Justice — Immigration and Naturalization Service

1 IMMIGRATION JUDGE:

2 As for the Order to Show Cause I don't see ^{any} ~~no~~ need for a motion
3 here.

4 MR. QUANE:

5 Well, I have instructed him not to answer the question based on the
6 fact that ...

7 IMMIGRATION JUDGE:

8 Oh, he's remaining mute?

9 MR. QUANE:

10 Yes sir.

11 IMMIGRATION JUDGE:

12 Oh I see, all right, now do you have any documents that pertain
13 to Wao Tse Chen?

14 MRS. ROHAN:

15 Yes, your honor, but I would like to examine him.

16 IMMIGRATION JUDGE:

17 All right, examine Mr. Chen.

18 MRS. ROHAN TO RESPONDENT:

19 Q. Mr. Chen, were you born in China?

20 IMMIGRATION JUDGE:

21 Before you go ahead, in view of the fact that he is remaining mute
22 I want to establish that he is remaining mute. I have nothing
23 other than counsel's statement here, so I am going to ask him ques-
24 tions in the Order to Show Cause and he may choose to answer or re-
25 main mute.

26 IMMIGRATION JUDGE TO RESPONDENT:

TRANSCRIPT OF HEARING

United States Department of Justice — Immigration and Naturalization Service

1 Q. Mr. Mao Tse Chen, is it true that you are not a citizen or national
2 of the United States?

3 A. I don't know.

4 Q. Well, are you a citizen of the United States?

5 A. I jumped ship to the United States.

6 Q. Are you a citizen of the United States, will you answer the ques-
7 tion yes or no?

8 MR. QUANE:

9 Your honor, I request a brief recess.

10 IMMIGRATION JUDGE:

11 Let him answer this question and then I'll give you a recess. This
12 is the third time I have asked him. It is a very simple question.

13 RESPONDENT:

14 A. I do not have citizenship here.

15 IMMIGRATION JUDGE TO RESPONDENT:

16 Q. Are you a ... were you born in China and are you a citizen of the
17 Republic of China on Taiwan?

18 MR. QUANE:

19 Your honor, before he answers that question may I be permitted to
20 speak to him outside.

21 IMMIGRATION JUDGE:

22 Well, he is remaining mute, you say, so I've got to ask him these
23 questions to establish that he is remaining mute.

24 MR. QUANE:

25 I don't think he understands how to respond.

26 IMMIGRATION JUDGE:

Well, apparently he understands he won't admit anything.

TRANSCRIPT OF HEARING

United States Department of Justice — Immigration and Naturalization Service

1 MRS. ROHAM:

2 He admitted that he jumped ship to come into the United States.

3 IMMIGRATION JUDGE TO RESPONDENT:

4 Q. Are you a citizen of China and were you born in China?

5 A. Yes, I was born in China.

6 Q. And you are a citizen of the Republic of China on Taiwan, is that
7 correct?

8 A. I am a citizen of China.

9 Q. Yes, but which part of China are you a citizen of, Nationalist
10 China or the Mainland of China?

11 A. China is only one and I was born in China and China is only one.

12 Q. I see, all right, did you enter the United States at New York City
13 on or about December 1969 as a nonimmigrant crewman authorized to
14 remain in the United States for a period of time your vessel re-
15 mained in port not to exceed 29 days. Did you enter in that way?

16 A. Yes.

17 Q. And did you remain in the United States after your vessel left the
18 United States, in any case, more than 29 days?

19 A. Yes sir.

20 Q. All right, now on the basis of the allegations that you just ad-
21 mitted Mr. Wao Tse Chen, I find that you are deportable from the
22 United States. Do you understand that?

23 A. ...

24 Q. Because you have remained longer than the 29 days and longer after
25 your ship left the United States, I am finding that you are depor-
26 table from the United States. I am just asking you if you under-

TRANSCRIPT OF HEARING

United States Department of Justice -- Immigration and Naturalization Service

1 Q. stand that?

2 A. I don't understand.

3 IMMIGRATION JUDGE TO COUNSEL:

4 Q. All right, do you concede on his behalf, in view of the admissions
5 that he made here today that he is deportable from the United States
6 Mr. Quame?

7 MR. QUAME:

8 At this point I am not willing to concede because, your honor I just
9 don't want to concede at this point.

10 MRS. ROMAN:

11 Your honor, can we have a recess?

12 IMMIGRATION JUDGE:

13 A recess?

14 MRS. ROMAN:

15 Yes.

16 IMMIGRATION JUDGE:

17 Lets proceed. All right.

18 OFF THE RECORD:

ON THE RECORD:

19 IMMIGRATION JUDGE TO COUNSEL:

20 Q. All right, do you have any application on behalf of the respondent,
21 Mr. Quame?

22 MR. QUAME:

23 I have two applications. I would like to submit a motion, I'd be
24 a little late but the question is, the legal question of whether or
25 not the respondent has to evoke the 5th amendment privilege, first
26 of all, whether his attorney can evoke his right under the 5th amend-

TRANSCRIPT OF HEARING

United States Department of Justice — Immigration and Naturalization Service

1 ment and whether or not the question should pursue subsequent to an
2 attorneys representation. He declined to answer the questions under
3 the 5th amendment, and based on that ...

4 **IMMIGRATION JUDGE:**

5 Where is the motion?

6 **MR. QUANE:**

7 Right here.

8 **IMMIGRATION JUDGE TO TRIAL ATTORNEY:**

9 I have your motion, now do you want an opportunity to reply to his
10 motion?

11 **MRS. ROHAN:**

12 Your honor, in view of the fact that there is nothing that has been
13 introduced at this point by the Government for which this motion
14 could possibly apply, there has been no documentary evidence sub-
15 mitted by the Government or anything else which could possibly be
16 the subject of this suppression motion. I don't see any need to
17 reply to that motion. ... Now, we'd just take Mr. Quane's state-
18 ment that he feels that the attorney should have the right to claim
19 the 5th amendment in behalf of his client and once he states that
20 his client refuses to answer such questions should questions take
21 place. Request time to reply to that and state that the Government
22 does not believe that is ...

23 **IMMIGRATION JUDGE:**

24 ALL right, in any case I have your motion to suppress and my deci-
25 sion on the motion is that the motion is denied based on the fact
26 that the weight of cases holds that where the person has admitted

TRANSCRIPT OF HEARING

United States Department of Justice — Immigration and Naturalization Service

1 alienage and deportability then the matter of how the evidence was
2 obtained is strictly collateral and has no bearing on the matter of
3 deportation. Now, are you making any application Mr. Quane.

4 MR. QUANE:

5 Yes your honor, for voluntary departure.

6 IMMIGRATION JUDGE:

7 Do you have any objection to voluntary departure?

8 MRS. ROHAN:

9 No, your honor.

10 IMMIGRATION JUDGE:

11 All right, how much time are you seeking Mr. Quane?

12 MR. QUANE:

13 Well, since we probably wouldn't take it as a final order, I don't
14 know whether or not, to be quite honest I don't know what the re-
15 sponse to that question will be. I assume, that we would want to
16 you know, appeal this question, assuming the Government ...

17 IMMIGRATION JUDGE:

18 Well, all right, but right now we are on the issue of how much time
19 you are seeking for voluntary departure.

20 MR. QUANE:

21 I'd ask for a period of 90 days.

22 IMMIGRATION JUDGE:

23 Do you have any objection to that, Mrs. Rohan?

24 MRS. ROHAN:

25 I would like to know why he needs 90 days.

26 IMMIGRATION JUDGE:

Well, you may question him.

TRANSCRIPT OF HEARING

United States Department of Justice -- Immigration and Naturalization Service

MRS. ROMAN TO RESPONDENT:

Q. Mr. Chen, why do you need 90 days to leave the United States?

A. I don't know where the 90 days come from.

IMMIGRATION JUDGE TO RESPONDENT:

Q. Mr. Wao Tse Chen, if I allowed you to leave the United States within 90 days, will you leave and when I say leave, I mean voluntarily at your own expense. Instead of being deported my question is will you leave within that time?

A. Yes, I accept.

IMMIGRATION JUDGE:

All right, I am now entering an order allowing you to leave the United States on a voluntary basis on or before November 2, 1976. If you have to be deported do you want to be deported to Taiwan? Is that the place that you select?

A. I would go to Canada.

Q. Have you ever been a resident of Canada? Have you ever been admitted to Canada for permanent residence?

A. I don't know, well I would stay at some other country.

Q. Mr. Chen, if you leave voluntarily you can go any place, any country or place that would accept you. We are talking about deportation, if you have to be deported do you wish to be deported to Taiwan?

A. Yes.

IMMIGRATION JUDGE:

I'll further direct in my order that you be deported to the Republic of China on Taiwan if you fail to leave on or before November 2, 1976. Now, is there any reason why you cannot return to the Republic of

1 China on Taiwan, would you be persecuted there by virtue of your
2 race, religion or political opinion?

3 A. No, I can go back.

4 IMMIGRATION JUDGE:

5 Mr. Quane, do you accept my decision as the final decision in this
6 case?

7 MR. QUANE:

8 No sir, we will reserve.

9 IMMIGRATION JUDGE:

10 Specifically as what part of my decision are you reserving.

11 MR. QUANE:

12 Your denial of my motion to suppress and the question does the
13 attorney have the right to claim the 5th Amendment for his client.

14 IMMIGRATION JUDGE:

15 Now, I just to state for the record that the remarks of the Trial
16 Attorney are well taken as far as the motion to suppress is concerned.
17 Mr. Quane, I hand you the necessary appeal forms and you no doubt
18 are aware as to the fact that you have 10 days within which to for-
19 mulate your appeal.

20 MR. QUANE:

21 Yes sir.

22 IMMIGRATION JUDGE:

23 Mrs. Mohan, do you waive?

24 MRS. MOHAN:

25 Yes sir.

26 IMMIGRATION JUDGE:

Hearing closed.

-11-

TRANSCRIPT OF HEARING

United States Department of Justice — Immigration and Naturalization Service

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I hereby certify that the foregoing knowledge and
belief the foregoing facts are a complete and
are a complete and true statement of the above -
described proceedings.

Martha Pasta
Signature
Transcriber
Title

TRANSCRIPT OF HEARING

United States Department of Justice — Immigration and Naturalization Service

MOTION FOR SEPARATE SUPPRESSION HEARING AND SUPPRESSION OF EVIDENCE
(Pages A14 to A16)

-----X

In the Matter	:	
of	:	A16 011 582
WAO TSE CHEN	:	<u>MOTION</u>

-----X

MOTION FOR SEPARATE SUPPRESSION HEARING
AND SUPPRESSION OF EVIDENCE

Respondent WAO TSE CHEN hereby requests a hearing apart and separate from his deportation hearing, to determine the admissibility in evidence against said respondent of all statements, documents, and other proof obtained as a direct or indirect result of the arrest of said respondent, at the TWIN DRAGON RESTAURANT, Bronx, New York on June 6, 1976, and subsequent interrogation at 20 West Broadway, New York City. This motion also relates to any material located in the Service's files as a direct result of information derived from the arrest and interrogation of respondent.

It is hereby requested that all such evidence be suppressed as it was obtained as a result of conduct by immigration officers in excess of the authority contained in Section 287 of the Immigration & Nationality Act, 8 U.S.C. 1357, and in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

It is further requested that the Immigration Service make the arresting officers available as witnesses at the hearing.

The affidavit of the respondent establishes that he was arrested by Immigration Officers on private property in the absence of consent to be on the premises reasonable suspicion of alienage. The conduct of the Immigration Officers in this case clearly violates the standard laid down by the Supreme Court in the case of U.S. v. Brignoni-Ponce, 95 S. Ct. 2574 (1975), wherein the Court held that government agents may detain individuals under Section 287 of th Act, only if they are aware of specific

articulable facts which reasonably warrant a suspicion of alienage and illegal presence.

Direct authority for the relief sought in this motion is contained in the decision of the Board of Immigration Appeals in Matter of Tang, Interim Decision, 2080. In Tang, the Board ruled that the procedure to be followed where a claim of illegally obtained evidence is made in a deportation hearing is "similar to that which prevails in criminal matters", citing rule 41(f) of the Federal Rules of Criminal Procedure. Rule 41(f) provides for the filing of a motion to suppress evidence under Rule 12. Rule 12 (b) provides for the filing of a motion raising defenses and objections which may be heard separate and apart from determination of the general issue.

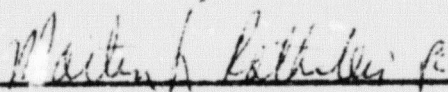
The Board in Tang also noted that serious charges of unconstitutionally obtained evidence should be initiated upon the sworn statement of persons having personal knowledge of facts, and that upon proof establishing a prima facie claim, "the Service will be called upon to assume the burden of justifying the manner in which it obtained its evidence." We respectfully submit that such prima facie showing has been made by the affidavits appended to this motion, and that in the absence of refutation by the Service, any evidence of deportability obtained as the result of the detention and interrogation of respondent should be suppressed. In this regard, the attention of the Immigration Court is invited to the Matter of Perez Lopez, Interim Decision 2132 (1972) in which an Immigration Judge suppressed illegally obtained evidence and terminated proceedings (although subsequently reopened with new lawful evidence), and to the recent decision of the U.S. District Court for the Northern District of Illinois in Illinois Migrant Council v. Pillod, 398 F. Supp. 882 (N.D. Ill. 1975).

The Pillod case involved an action for injunctive and declaratory relief from unlawful Service detention and interrogation. In holding the Government conduct unlawful, the Court noted that if the case had been a "criminal case or deportation proceeding . . . evidence . . . derived from the obviously unlawful stops . . . would be ordered suppressed (398 F. Supp. 882).

On the basis of all of the above, it is respectfully urged that the relief requested in this motion be granted, and that a separate hearing be held to rule upon respondent's request for suppression of evidence.

Respectfully submitted,

FRIED, FRAGOMEN & DEL REY, P.C.
515 Madison Avenue
New York, New York 10022
Tel No. (212) 688-8555



MARTIN L. ROTHSTEIN
Of Counsel.

AFFIDAVIT OF WAO TSE CHEN SWORN TO JUNE 25th, 1976 (Pages A17 and A18)

-----X

:

In the Matter	:	A16 011 582
of	:	AFFIDAVIT OF
WAO TSE CHEN	:	<u>WAO TSE CHEN</u>

-----X

STATE OF NEW YORK)
 : SS.:
 COUNTY OF NEW YORK)

WAO TSE CHEN, being duly sworn, deposes and says:

1. I am a respondent in deportation proceedings, and I make this affidavit to explain how I was arrested by officers of the U.S. Immigration Service.

2. On June 6, 1976, at about 9 p.m., I was in the kitchen area of the Twin Dragon Restaurant, located at 2184 White Plains Road, Bronx, New York
 Bronx, New York. I was merely sitting on a table dressed in a white shirt and black pants. I was not moving or talking, but only sitting. Four men, who I later learned were Immigration Officers suddenly burst into the kitchen saying "Immigration, Immigration." They showed me a badge, and questioned my nationality and right to be in the United States. I answered their questions as best I could and I gave them my passport. I was then taken to Immigration Headquarters where I was asked more questions and asked to sign a statement which I did not understand.

3. At the time I was first detained and questioned, I was just sitting, and I was not doing anything suspicious

AIR

or unusual. I was also informed by the owner of the restaurant that the Immigration Officers had no permission to be on the premises.

X WAO Tse Chen

WAO TSE CHEN

Sworn to before me this

25th day of June, 1976.

F. ENRIQUE LAU
Notary Public, State of New York
No. 41-4624905
Qualified in Queens County
Commission Expires March 30, 1978

STATE OF NEW YORK)

: SS.:

COUNTY OF NEW YORK)

JOCELYN TEH, being duly sworn, deposes and says:

1. I am an employee of the firm of FRIED, FRAGOMEN & DEL REY, P.C., 515 Madison Avenue, New York, NY, and I am familiar with the Chinese and English Languages.

2. On June 25th, 1976, I translated the above affidavit into the Chinese language for Mr. Wao, who indicated to me that he understood the contents thereof; that all information contained in the affidavit was true; and that he understood that he was swearing to the truth of all such statements.

Jocelyn Teh
JOCELYN TEH

Sworn to before me this

25th day of June, 1976.

F. ENRIQUE LAU
Notary Public, State of New York
No. 41-4624905
Qualified in Queens County
Commission Expires March 30, 1978

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
26 Federal Plaza
New York, New York 10007

PLEASE REFER TO THIS FILE NUMBER

A16 011 582 DB/JR
November 7, 1977

WU Chi Yim
2184 White Plains Road
Bronx, N.Y. 10462

Please note the below checked action which has been taken in your case.

☐ You have violated the terms of your admission as a nonimmigrant. Consequently, permission previously granted you to remain in the United States is rescinded. You are required to depart from the United States at your own expense on or before _____.

☒ In accordance with a decision made in your case you are required to depart from the United States at your own expense on or before November 27, 1977.

☐ Your application for an extension of time in which to depart from the United States has been _____ . You are required to depart on or before _____.

You must notify this office, Room No. _____, on or before _____ of the arrangements you have made to effect your departure, including the date, place, and manner.

Failure to depart on or before the specified date may result in the withdrawal of voluntary departure and action being taken to effect your deportation.

If there is a bond outstanding in your case, you are warned that to expedite cancellation of the bond and return of the collateral posted, you must make advance arrangements with this office to have your departure witnessed by an officer of this Service.

USE THE ENCLOSED SELF-ADDRESSED CARD TO NOTIFY THIS OFFICE REGARDING DEPARTURE ARRANGEMENTS. POSTAGE IS NOT REQUIRED. At the time of your departure, do not fail to surrender Form I-94, ARRIVAL-DEPARTURE RECORD, in accordance with instructions on that form.

cc: Fried, Fragonan, Esq.
515 Madison Avenue
New York, N.Y. 10022

Very truly yours,

Maurice F. Kiley
MAURICE F. KILEY
DISTRICT DIRECTOR

FOR IMMIGRATION AND NATURALIZATION USE ONLY

Departed:

Port _____ Date _____ ☐ I-94 stamped ☐ I-530 submitted
To _____ Via _____ ☐ I-161 prepared ☐ I-156 prepared

ORDER OF BOARD OF DEPORTATION APPEALS (Pages A20 to A25)

MATTER OF BUTOS-ELIAS

United States Department of Justice
Board of Immigration Appeals
Washington, D.C. 20530

MAR 26 1976

File: A20 798 198 - New York

In re: EDISON BULOS-ELIAS

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Austin Fragomen, Esquire
Fried, Fragomen & Del Rey, P.C.
515 Madison Avenue
New York, New York 10022

ON BEHALF OF I&N SERVICE: George Indelicato
Appellate Trial Attorney

ORAL ARGUMENT: September 10, 1975

CHARGES:

Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251
(a)(2)) - Entered without inspection

APPLICATION: Termination of proceedings; or, in the
alternative, voluntary departure

This is an appeal from the November 22, 1974 decision of an immigration judge finding the respondent deportable as charged and directing his deportation to Argentina. The appeal will be dismissed.

After identifying himself by name and stating that he had received a copy of the Order to Show Cause from the Immigration and Naturalization Service, the respondent refused to testify as to his deportability, asserting

A20 798 198

the privilege against self-incrimination of the Fifth Amendment of the United States Constitution, and putting the Service to its proof of the allegations in the Order to Show Cause. The respondent did testify in support of his application for voluntary departure. The respondent raised several issues and objections during the course of the deportation proceeding and asserts them now on appeal. We shall respond to each in turn.

To prove that the respondent was an alien the Service introduced an Argentine passport bearing his name and a photographic likeness of him. The respondent moved to suppress this evidence as the product of an illegal search. The passport had been seized by immigration officers at the Canadian border from a suitcase which was in the possession of a United States citizen friend and co-worker of the respondent. The respondent asserted in his motion that the Service had exceeded the authority of section 287(c) of the Immigration and Nationality Act when it searched luggage carried by an individual whose United States citizenship was not in question and who therefore was not amenable to exclusion from the United States.

Although the respondent's suitcase was searched and his passport seized, these personal effects were in the possession of his friend, who was crossing the United States-Canadian border, and the respondent himself was not present. The search of the respondent's suitcase was part of a routine customs border inspection, and it was proper procedure for the customs officer to turn the passport, traveling without its owner, over to the officers of the Immigration and Naturalization Service at the border. Furthermore, the respondent's friend made no objection to the search or to the seizure of the passport, and he testified that if he had been told of his right to object, he would nevertheless have consented. Accordingly, we uphold the immigration judge's decision to deny the motion to suppress the evidence obtained as a result of searching the respondent's suitcase at the Canadian border.

A20 798 198

When he moved to suppress the Service evidence, the respondent requested that a separate hearing be held on the motion, or, in the alternative, that evidence in connection with the motion not be considered in determining the issue of the respondent's deportability. He cited Simmons v. United States, 390 U.S. 377 (1968), in support of his motion. In Simmons the Supreme Court of the United States held that testimony given by a defendant in criminal proceedings in support of a motion to suppress evidence on Fourth Amendment grounds could not thereafter be admitted against him at a trial on the issue of guilt unless he made no objection. Counsel for the respondent urged that by analogy, evidence in support of a motion to suppress evidence on Fourth Amendment grounds should not thereafter be admitted against a respondent in deportation proceedings on the issues of alienage and deportability.

Although the immigration judge denied this request, it does not appear to us that he determined the respondent's alienage or deportability on the basis of testimony given on the motion to suppress, and in fact, the respondent did not testify on this motion, although he did present as a witness his United States citizen friend who carried his suitcase across the border. Under these circumstances, we do not find it necessary to address the question of whether a separate hearing should be held on a motion to suppress evidence, or whether testimony given by a respondent in support of such a motion should or should not thereafter be admitted over his objection on the issues of alienage and deportability.

Counsel for the respondent moved to terminate the proceedings alleging that the Service had exceeded its authority under section 287(a)(2) of the Act when its officers improperly arrested the respondent without a warrant on November 13, 1974, when they had sufficient information on which to base an arrest warrant as early as November 6, 1974. That was when the respondent's

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passport was discovered and the respondent's friend was interviewed at the Canadian border. The Order to Show Cause and warrant of arrest were not issued until November 14, 1974.

It is possible that a warrant could have been obtained prior to the respondent's arrest. However, assuming, arguendo, that there was a defect in the arrest procedure, it is cured if a resulting deportation order is adequately supported. Bilokumsky v. Tod, 263 U.S. 149 (1923); La Franca v. INS, 413 F.2d 686, 689 (2 Cir. 1969); Vlassidis v. Anadel, 262 F.2d 398, 400 (7 Cir. 1959).

Counsel for the respondent argues that the Service failed to sustain its burden to prove alienage and deportability by clear, convincing, and unequivocal evidence, since the finding of alienage and deportability was based on the presumption contained in section 291 of the Act. That section places the burden to show the time, place, and manner of entry into the United States upon the respondent in deportation proceedings, and provides that if that burden is not sustained, the respondent shall be presumed to be in the United States in violation of law. Counsel contends that when the charge is entry without inspection, this statutory provision places "an impermissible burden" upon the respondent when he asserts the Fifth Amendment privilege against self-incrimination, for illegal entry can subject a person to criminal penalties. According to counsel, in such a case the respondent is in a double bind, for if he testifies as to how he entered the United States, he is vulnerable to prosecution for illegal entry, but if he asserts his privilege not to testify, he is vulnerable to prosecution anyway because illegal entry is presumed under section 291. Thus counsel asserts that it is unconstitutional to require a respondent to prove the time, place, and manner of entry under section 291 when the charge is entry without inspection and when the respondent asserts his Fifth Amendment privilege not to testify.

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We lack jurisdiction to pass upon the constitutionality of the statutes we administer. Matter of Chery and Hassan, Interim Decision 2405 (BIA 1975); Matter of L-4 I&N Dec. 556 (BIA 1951). Moreover, we agree with the immigration judge that the Argentine passport issued to a person with the same name as the respondent and containing a photograph resembling him, and which does not contain a visa permitting entry into the United States or a stamp indicating inspection and entry, coupled with the respondent's presence in the United States and his failure to deny that the passport is his, is clear, convincing, and unequivocal evidence on which to base a finding of alienage and deportability. Therefore, reliance on the section 291 presumption merely provides corroboration of the respondent's alienage and deportability.

The immigration judge based his finding of alienage and deportability partly on the respondent's testimony in support of his application for voluntary departure. Counsel points out that this was improper.

Under 8 C.F.R. 242.17(d) an application for voluntary departure shall not be held to constitute a concession of alienage or deportability in any case in which the respondent does not admit his alienage or deportability. In this case the alien steadfastly refused to testify as to alienage or deportability in the case-in-chief on Fifth Amendment grounds. When he offered to testify concerning voluntary departure, he did not intend to testify as to the manner of his entry into the United States until the immigration judge indicated that there was no possibility that the application would be granted unless such testimony were given (Tr. pp. 25-26). Still, counsel for the respondent stated that the respondent's testimony was to be given "purely for the purposes of our application for voluntary departure." (Tr. p. 26.) The respondent then stated, among other things, that he was a native of Argentina and that he had entered the United States without inspection. The immigration judge

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relied partly on this testimony in arriving at the conclusion that the respondent was deportable as charged. He should have disregarded this part of the respondent's testimony.

There appears to be a misconception concerning the scope of the testimony of a respondent who is applying for the privilege of voluntary departure. Such testimony is given for the purpose of ascertaining whether the respondent is eligible for, and deserves a grant of, that privilege. To establish eligibility for voluntary departure the respondent need show only that he has been a person of good moral character for at least five years preceding the application, section 244(e), Immigration and Nationality Act, and that he is willing to depart promptly from the United States, 8 C.F.R. 244.1. The testimony of a respondent in connection with his application for the privilege of voluntary departure may or may not touch upon alienage and deportability. In any case, such testimony must not be used for the purpose of either establishing or confirming his alienage or deportability. Nevertheless, since the respondent's testimony was simply corroborative of what had already been established by his passport and his failure to deny that the passport was his, we are satisfied that the immigration judge's erroneous reliance on that testimony was not prejudicial.

We find the respondent's contention that the immigration judge abused his discretion in denying voluntary departure to be without merit.

In view of the foregoing, we agree with the result of the immigration judge's decision and shall dismiss the appeal.

ORDER: The appeal is dismissed.

Chairman

FRIED FRAGOMEN

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that
deponent is not a party to the action, is over 18 years of age
and resides at 286 Richmond Avenue, Staten Island, N.Y.
10302. That on the 13 day of Jan. , 19 78 at
No. 1 Saint Andrews Plaza, NYC 10007

deponent served the within *Appendix*
upon Thomas Belote, Esq.

the Appellee herein, by delivering / true
copy(ies) thereof to him personally. Deponent knew the person so
served to be the person mentioned and described in said papers as the
Appellee therein.

Sworn to before me this
13 day of Jan. 1978

Edw Bailey

Edward Bailey

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978